

# SENATE BILL REPORT

## SSB 5064

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As Amended by House, March 2, 2018

**Title:** An act relating to the freedom of expression rights of students at public schools and institutions of higher education.

**Brief Description:** Concerning freedom of expression rights of students at public schools and institutions of higher education.

**Sponsors:** Senate Committee on Early Learning & K-12 Education (originally sponsored by Senators Fain, Rolfes, Rivers, Pedersen, Ranker, Mullet, Billig, Becker, Braun, King, Darneille, Chase, Carlyle and Palumbo).

**Brief History:**

**Committee Activity:** Early Learning & K-12 Education: 1/19/17, 2/16/17 [DPS].

**Floor Activity:**

Passed Senate: 3/02/17, 45-4; 1/19/18, 43-5.

Passed House: 3/02/18, 91-6.

### Brief Summary of First Substitute Bill

- Expands free speech protections for students in public high schools and institutions of higher education.
- Excludes from mandatory prior review any media produced by students at public institutions of higher education.
- Prohibits the discipline or termination of student media advisors for failure to suppress school sponsored media.
- Protects school officials from civil or criminal liability resulting from school sponsored media.

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### SENATE COMMITTEE ON EARLY LEARNING & K-12 EDUCATION

**Majority Report:** That Substitute Senate Bill No. 5064 be substituted therefor, and the substitute bill do pass.

Signed by Senators Zeiger, Chair; Fain, Vice Chair; Rolfes, Ranking Minority Member; Mullet, Rivers and Warnick.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Staff:** Benjamin Omdal (786-7442)

**Background:** The courts have held that students retain their constitutional rights to freedom of expression in public schools. In the 1969 case, *Tinker v. Des Moines Independent Community School District*, the Supreme Court stated that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The court also recognized the duty and authority of school officials to prescribe and control the conduct in schools. The court held that a school may not regulate student expression unless the expression would cause a material and substantial interference with the operation of the school or invade the rights of others.

In 1988, the Supreme Court addressed the issue of the extent to which a public high school could regulate expression in high school newspapers. In *Hazelwood School District v. Kuhlmeier*, the court held that school-sponsored student expression that occurs in a nonpublic forum may be regulated as long as the regulations are "reasonably related to a legitimate pedagogical concern." In determining whether a newspaper was a public or limited public forum, rather than a nonpublic forum, the court stated that public schools generally are not open to the public for free speech. Therefore, a school may be considered a public or limited public forum only if the school has opened its facilities, by practice or policy, for use by the general public or some segment of the public, such as student organizations.

The Supreme Court in *Hazelwood* expressly refrained from deciding whether this standard applies to school-sponsored expressive activities at the college and university level. The First and Sixth Circuit Court of Appeals have found that the *Hazelwood* standard does not apply to school-sponsored student expression at colleges and universities. However, in 2005, the Seventh Circuit Court of Appeals held, in *Hosty v. Governors State University*, that the analysis used in *Hazelwood* does apply to colleges and universities. Thus, *Hosty* provides that if the student expression occurs in a nonpublic forum, a college or university may exercise control over the content of the expression based on reasonable pedagogical concerns. Under *Hosty*, student media may be considered a public forum or limited public forum if the school, through its policies or practices, has recognized the medium as a designated public forum where students determine the editorial content of the medium.

Washington's institutions of higher education currently have policies providing editorial freedom for their student papers. The State Board for Community and Technical Colleges' regulations require each community college district to adopt rules relating to students' rights and responsibilities regarding freedom of expression and freedom of the press. Some colleges have adopted regulations that expressly provide for freedom of expression in student publications. Others have more general rules that provide that students are free to express their views by orderly means, as long as they do not disrupt the operations of the college.

**Summary of First Substitute Bill:** Public High Schools. Student editors at public high schools are responsible for determining the news, opinion, feature, and advertising content of student media. A student media adviser may not be terminated, transferred, removed, or otherwise disciplined for failing to suppress protected student media.

School officials may only prohibit student media that:

- is libelous or slanderous;

- is an unwarranted invasion of privacy;
- is obscene or indecent pursuant to the Federal Communications Act or any rule or regulation of the Federal Communications Commission;
- incites students to commit an unlawful act on school premises or violate a lawful school regulation; or
- creates a material and substantial disruption of the orderly operation of the school.

A school official must base a forecast of material and substantial disruption on specific facts, including past experience in the school and current events influencing student behavior. A school official may not base a forecast of a material and substantial disruption on an undifferentiated fear or apprehension.

Political expression by students in school-sponsored media may not be deemed the use of public funds for political purposes.

Any student, individually or through his or her parent or guardian, enrolled in a public high school may file an appeal of an alleged violation, as provided in statute.

Expression made by students in school-sponsored media is not necessarily the expression of school policy. No school official, governing board of the school, or school district may be held responsible in civil or criminal action for any expression made or published by students in school-sponsored media.

Each school district must adopt a written student freedom of expression policy. The policy may include reasonable provisions for the time, place, and manner of student expression.

Public Institutions of Higher Education. Students at public institutions of higher education have the right to exercise freedom of speech and of the press in school-sponsored media, including media that are supported financially by the school or produced in conjunction with a class. All school-sponsored media produced by students are public forums for expression by student journalists and editors. Student media, whether school-sponsored or non-school sponsored, are not subject to mandatory prior review by school officials.

Student editors are responsible for determining the news, opinion, feature, and advertising content of the media. A student media adviser may not be terminated, transferred, removed, or otherwise disciplined for refusing to suppress protected expression by student journalists.

Students are not authorized to engage in expression that:

- is libelous or slanderous;
- constitutes an unwarranted invasion of privacy;
- violates the Federal Communications Act or any rule or regulation of the Federal Communications Commission;
- incites students to commit unlawful acts on school premises or violate lawful school regulations; or
- creates a material and substantial disruption of the orderly operation of the school.

A school official must base a forecast of material and substantial disruption on specific facts, including past experience in the school and current events influencing student behavior. A

school official may not base a forecast of a material and substantial disruption on an undifferentiated fear or apprehension.

Any student enrolled in an institution of higher education may commence a civil action for injunctive or declaratory relief for violation of the student's right to freedom of speech and of the press in school-sponsored media. A court may award reasonable attorney's fees to a prevailing plaintiff.

Expression made by students in school-sponsored media is not the expression of school policy. School officials or the governing board are not legally responsible for school-sponsored media, unless the school official or the governing board interfered with or altered the content of the media.

**Appropriation:** None

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony on Original Bill:** *Testimony from 2017 Regular Session. The committee recommended a different version of the bill than what was heard.*

PRO: The culture of free expression and of respect for the journalistic arts is critical to a functioning democracy. Students should have the same rights and responsibilities as other citizens so that they know they are embarking on a profession that matters. There is a thin barrier between objective and investigative journalism and the culture needs to respect the opportunity of journalists to operate. Student journalists should be held to the same guidelines as professionals. Prior restraint prevents students from having a true and honest voice. Freedom of speech and of the press allows students to inform their peers on issues that matter. The threat of prior restraint causes self-censorship. Censored news is fake news. Student media literacy is important, especially for those students who want to enter the journalism profession. Journalism programs allow students to work together under leadership to produce items that are of interest to their peers, which teaches them valuable collaboration and problem solving skills. The nation today struggles with fake news so it is vital that students learn media literacy in order to discuss important issues and inform the public. Students who study and practice true journalism have a better understanding of civic responsibilities and are more active as adults in civic matters in their communities. The bill promotes clarity for both students and administrators. Washington would be the eleventh state in the country to pass a student free speech law. When student control of conduct is lost it impacts the quality of work and the types of issues students are willing to tackle. The bill offers good protections for school media advisers and schools.

CON: Principals and student media advisers should be partners. This bill cuts the principal out of the discussion. Advisers are not always well trained. Having a partnership between principals and student journalism programs allows the principal to be part of the process from the start.

OTHER: School directors across the state support the first amendment rights of students in K-12 public schools. The bill offers a necessary safe harbor for limiting the liability of schools. K-12 students operate in a different environment than higher education students. The bill could benefit from a few modifications to the K-12 public school sections, including greater clarity in the exceptions to protected speech. The reference to the Federal Communications Commission rules is adequate and should remain, as a number of higher education institutions and public school district have noncommercial radio station licenses and must comply with these rules.

**Persons Testifying:** PRO: Senator Joe Fain, Prime Sponsor; Fern Valentine, Washington Journalism Education Association; Mariah Valles, Auburn High School; Diego Izquierdo, Auburn High School; Hewan Mengistu, Cleveland High School; Kay Locey, Journalism Education Association Mentoring Program; Vincent DeMiero, Instructor/Adviser, Mountlake Terrace High School; Ronnie Estoque, Cleveland High School; Eleanor Dudley, Student Editor, Ballard High School; Oscar Zahner, Ballard High School Reporter; Peggy Watt, Professor of Journalism, Western Washington University; Haley Keizur, Social Media Editor, The Viking Vanguard; Jaxon Owens, Editor-in-Chief, The Viking Vanguard; Mike Hiestand, Student Press Law Center.

CON: Jerry Bender, Association of Washington School Principals.

OTHER: Keith Shipman, Washington State Association of Broadcasters; Mark Allen, Washington State Association of Broadcasters; Jessica Vavrus, Washington State School Directors' Association.

**Persons Signed In To Testify But Not Testifying:** No one.

**EFFECT OF HOUSE AMENDMENT(S):**

- Allows for restriction of expression that violates or incites students to violate federal or state laws, rules, or regulations; that violates school district policy related to harassment or discrimination; or that incites higher education students as to create a clear and present danger of the violation of lawful school policies and procedures.
- Creates an intent section.